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Nos. 04-1244 & 04-1352

IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, *et al.*,

Petitioners,

-and-

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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PARTIES

There are two sets of Petitioners. Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc., are referred to herein collectively as "Scheidler" or the "Scheidler Petitioners." Operation Rescue is referred to herein as "OR." The Scheidler petition is cited as "Sch. Pet.," and its appendix as "Sch. App." OR's petition is cited as "OR Pet.," and its appendix as "OR App." The Appendix to this Brief in Opposition is cited as "App."

RULE 29.6 STATEMENT

Respondents are the National Organization for Women, Inc.; National Women's Health Organization of Summit, Inc., d/b/a Summit National Women's Health Organization; and National Women's Health Organization of Delaware, Inc., d/b/a Delaware Women's Health Organization. Respondents were plaintiffs below and were also respondents before this Court in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003) (*"Scheidler II"*). None of the Respondents has a parent corporation and none issues stock to the public.

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BRIEF IN OPPOSITION

DECISIONS BELOW

The Seventh Circuit's decision denying rehearing (Sch. App. 1a-24a) is reported at 396 F.3d 807. That court's decision on remand, (Sch. App. 25a-29a), is unreported. Remand was from this Court's decision, (OR App. 32a-55a), reported at 537 U.S. 393 ("*Scheidler II*"). *Scheidler II* reversed and remanded the Seventh Circuit's decision, (Sch. App. 30a-61a), reported at 267 F.3d 687. The grants of *certiorari* precedent to *Scheidler II*, (OR App. 138a), are reported at 535 U.S. 1016. This case was before this Court previously, and the decision is reported at 510 U.S. 249 ("*Scheidler I*"). The trial court's entry of judgment against Petitioners and issuance of an injunction, (Sch. App. 141a-195a), was not reported.

JURISDICTION

All Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(a) as to all questions presented. The Scheidler Petitioners also invoke jurisdiction under 28 U.S.C. § 1651 as to their first question. Petitioners have complied with the Court's requirements for *certiorari* jurisdiction under § 1254(a) but have not met the requirements of § 1651. *See* n.7, *supra*.

STATEMENT OF THE CASE

At the heart of Petitioners' request for a writ of *certiorari* are two purported holdings – one by this Court and one by the Seventh Circuit – that simply do not exist. Petitioners

first contend that in *Scheidler II*, this Court held in favor of the "two-way" rather than the "three-way" reading of the Hobbs Act, 18 U.S.C. § 1951(a), and reversed the jury's finding of 4 acts or threats of physical violence.[1] Petitioners never asked the Court to make that ruling in *Scheidler II*, however. Second, Petitioners argue that, on remand from *Scheidler II*, the Seventh Circuit held against them as to whether the Hobbs Act forbids acts or threats of physical violence that obstruct, delay, or affect interstate commerce and upheld the injunction entered against them after trial. In fact, the Seventh Circuit did neither. It twice stated that it had *not* decided the physical violence issue and had remanded to the trial court, *first*, to determine whether the 4 acts involving physical violence *could* support an injunction, and, *second*, to address the physical violence issue – but *if and only if* the trial court first determined that an injunction was otherwise called for. Sch. App. 6a–8a, 28a–29a.

None of the questions presented by Petitioners warrants *certiorari*. Each Petitioner's first question asks whether the Seventh Circuit disregarded *Scheidler II* by remanding to the district court to address the physical violence predicates found by the jury. In *Scheidler II*, Petitioners did not ask this Court to review the jury's findings regarding these 4 acts, but they now contend that this Court reached beyond both their petitions and the Court's own limited grant of *certiorari* and

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[1] Respondents' interpretation of § 1951(a) is referred to as the "three-way" interpretation, as it forbids robbery, extortion and physical violence. Petitioners' is referred to as the "two-way" interpretation, as it forbids only robbery and extortion.

decided the physical violence issue in Petitioners' favor – without saying even one word on the subject. The Court should follow its long-standing practice of allowing lower courts on remand to determine whether issues remain open and to resolve any such issues in the first instance.

Petitioners' second and third questions involve statutory construction questions that are not yet ripe for consideration and that may be rendered moot by the district court's action on remand. In fact, the second question, whether § 1951(a) should be given the two-way or three-way reading, has never been decided by any court in this litigation. Before considering *certiorari*, the Court should wait to see whether these questions are mooted by further proceedings below.

A. Factual Background: The Jury and the Trial Court Found 121 Predicate Acts Under RICO, Including 4 Acts or Threats of Physical Violence

Respondents filed this case to protect themselves – medical providers and patients – from Petitioners' attempts to disrupt healthcare facilities that offer a wide range of women's health services, including abortions, by *inter alia*, forcible blockades and violence. The district court initially dismissed the complaint, and the Seventh Circuit affirmed. This Court, however, reversed, finding that the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), does not have an "economic motive" requirement. *Scheidler I.*

On remand, the district court conducted a seven-week jury trial. Respondents offered proof that Petitioners were

responsible for dozens of predicate acts under RICO, including state law extortion; extortion under the Travel Act, 18 U.S.C. § 1952; and two distinct types of Hobbs Act violations: (1) extortion, and (2) acts or threats of physical violence. 18 U.S.C. § 1951. The distinction between these types of Hobbs Act violations is at the heart of the current dispute. The Hobbs Act is titled "Interference with Commerce by Threats or Violence" and states:

> Whoever in any way or degree obstructs, delays or affects commerce ... by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

18 U.S.C. § 1951(a). The special interrogatories to the jury posed separate questions on the extortion and physical violence prongs of §1951(a), and the physical violence predicates did not require a connection to robbery or extortion. Petitioners now argue that this was error because, they say, their physically violent acts violate § 1951(a) only if they were in furtherance of a plan to commit robbery or extortion.

Respondents presented evidence of several acts involving physical violence that had been authorized or ratified by Petitioners' enterprise, the Pro-Life Action Network ("PLAN"), with specific intent by each Petitioner. Sch. App. 185a. For example:

- A patient seeking follow-up treatment to ovarian surgery was grabbed and beaten with an anti-abortion sign until her sutures ruptured and she passed out. Trial Transcript ("Tr.") 1514–26, 4985.

- A healthcare facility was invaded, its medical equipment was "trashed," and a staff member and a volunteer were attacked and seriously injured. Tr. 1468-72, 4012-26, 4975.

- Patients trying to pass through a corridor created by federal marshals were grabbed, scratched and bruised. Tr. 766-85, 4984.

- A doctor was grabbed by the leg and shoved against a van to prevent her from entering the clinic. Tr. 1705-06, 4986.

- A clinic administrator was grabbed by the hair and thrown to the concrete sidewalk as she tried to enter the clinic. Tr. 4826-30.

A unanimous jury returned a verdict with detailed special interrogatories, finding Petitioners responsible for operating PLAN through a pattern of 121 RICO predicates, including 4 acts or threats of physical violence. Sch. App. 190a–195a. 117 of these predicate acts were premised on federal or state extortion, including 21 Hobbs Act extortion violations, 25 state law extortion violations, 25 instances of attempting or conspiring to violate state or federal extortion law, 23 Travel Act extortion violations, and 23 attempted Travel Act extortion violations. The 4 acts or threats of physical violence under § 1951(a) were not premised on extortion. Sch. App. 191a; *see also* Sch. App. 190a–195a.

The trial court entered judgment on the jury's verdict and issued an opinion citing several of the physically violent acts proved at the trial. Sch. App. 142a-145a. Based on its findings, the trial court issued a nationwide injunction prohibiting Petitioners from, among other things, "using violence or threat of violence against any Plaintiff Clinic or any of its employees, volunteers, or any woman who seeks to use the services of such a Clinic." Sch. App. 172a.

B. After the Trial, Petitioners Asked the Seventh Circuit to Reverse all the Predicate Acts, Including the 4 Acts or Threats of Physical Violence

Petitioners appealed to the Seventh Circuit, arguing that all the predicate acts should be declared invalid bases for RICO liability. The Seventh Circuit acknowledged the jury's finding of 4 acts involving physical violence among the 121 predicate acts, Sch. App. 34a, but concluded that the 21 extortion-based Hobbs Act violations were sufficient to affirm the judgment. Therefore, it did not reach Petitioners' argument for the two-way reading of § 1951(a). Sch. App. 59a-60a. Thus, at the conclusion of the Seventh Circuit appeal, in what would soon become *Scheidler II*, Respondents remained the prevailing party on the 4 physical violence predicates.

C. Petitioners Did Not Seek a Writ of *Certiorari* Regarding the 4 Acts or Threats of Physical Violence

In their petitions for writs of *certiorari* following their loss in the Seventh Circuit, Petitioners asked this Court to

decide various questions, but no Petitioner challenged the 4 physical violence predicates found by the jury as a basis for RICO liability. Rather, the Scheidler Petitioners asked the Court to review the availability of injunctions to private RICO litigants, whether the First Amendment shielded their conduct, and whether the Hobbs Act's extortion prong applied to "protesters who engage in sit-ins and demonstrations that obstruct the public's access to a business's premises and interfere with the freedom of putative customers to obtain services offered there." 01-1118 Cert. Pet. i. OR asked the Court to review the injunction question, a First Amendment question, whether they had obtained property under the "federal extortion statute," and whether "generic" state extortion instructions were proper. 01-0119 Cert. Pet. i.

Respondents' Brief in Opposition noted that the 4 predicate acts premised on physical violence were unchallenged by Petitioners. 01-0119, 01-0118 Br. In Opp'n 5 n.4, 7, 15. In reply, each of the Petitioners devoted only a footnote to the physical violence issue, arguing the two-way approach. 01-0118 Cert. Reply Br., 8 n.11; 01-0119 Cert. Reply Br., 7 n.13. Petitioners did not, however, revise their petitions or otherwise ask this Court to review this additional question of statutory construction, as they were permitted to do. *Costello v. United States*, 365 U.S. 265, 284 (1961); Robert L. Stern, et al., SUPREME COURT PRACTICE, p. 427 (8th Ed. 2002).

This Court limited its grant of *certiorari* to two of the questions presented: the availability of injunctions in private

RICO cases, and whether Petitioners' "sit-ins and demonstrations" were extortion under the Hobbs Act. OR App. 138a.

Petitioners' merits briefs failed to discuss the physical violence issue. Although they listed the 4 acts involving violence in their descriptions of the proceedings, they did not argue for their two-way interpretation of § 1951(a). 01-0118 Merits Br. 7, n.7; 01-0119 Merits Br. 4, n.8, 5, n.10. Indeed, Petitioners' only mention of these 4 acts was their observation that without the 21 Hobbs Act extortion violations, there was no way to determine whether the remaining predicate acts satisfied RICO's "pattern" requirement. Therefore, they argued, the judgment should be vacated, presumably for further proceedings in the trial court. 01-0119 Merits Br. 17 n.12. (This argument foreshadowed the Seventh Circuit's action on remand: a further remand to the trial court to determine whether the 4 physical violence predicates alone could support injunctive relief.) Petitioners also failed to raise their two-way interpretation of § 1951(a) at oral argument. Quite logically, the Court made no inquiry on the subject and Respondents made no response.

D. *Scheidler II* Did Not Address the Physical Violence Issue

Because Petitioners did not raise the issue in their questions presented or in their merits briefs, the proper interpretation of the physical violence prong of §1951(a) was not before this Court in *Scheidler II*. It was not surprising, then, that this Court did not say one word on the subject. In

fact, the 4 physical violence predicates found by the jury were excluded from the Court's description of the jury's findings, which enumerated only the 117 extortion-based predicates rather than the full 121.[2] OR App. 34a. The Court's discussion, too, never mentioned this issue, but focused on whether Petitioners had "obtained property" within the meaning of extortion. The Court concluded Petitioners had not "obtained property," and thus invalidated the 21 Hobbs Act extortion predicates. *Id.* at 37a-46a.

The Court also concluded that its holding that extortion required the acquisition of property controlled the other extortion-based predicates.[3] Because none satisfied the "obtaining property" requirement, the Court also invalidated the state law and Travel Act extortion predicates:

> Because petitioners did not obtain or attempt to obtain respondents' property, both the state extortion claims and the claim of attempting or conspiring to commit state extortion were fatally flawed. The 23 violations of the Travel Act and 23 acts of attempting to violate the Travel Act also fail. These acts were committed in furtherance of allegedly extortionate conduct. But

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[2] In listing the extortion-based predicate acts, the Court noted that the jury had found, "*inter alia*," that the pattern of racketeering included acts of Hobbs Act extortion, state law extortion, Travel Act extortion, plus attempts or conspiracies under each of those laws.

[3] As OR notes, OR Pet. at 4 n.3, the state and federal extortion instructions were virtually identical except for the interstate commerce element.

> we have already determined that petitioners did not commit or attempt to commit extortion.

Id. at 47a-48a.

Entirely absent from the Court's discussion is any mention of the 4 predicate acts found by the jury premised on physical violence. Not one word. Having invalidated all of the extortion-based predicates, however, the Court added that because "all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated." *Id.* at 48a. The Court did not vacate the judgment, but ordered: "the cases are remanded to the United States Court of Appeals for the Seventh Circuit *for further proceedings in conformity with the opinion of this Court.*" App., *infra*, 1 (emphasis added). The issue of what "further proceedings" were appropriate thus remained for the Seventh Circuit to determine.

E. The Seventh Circuit Identified the Remaining Issues and Remanded to the District Court

On remand to the Seventh Circuit, the parties complied with Seventh Circuit Rule 54, which requires "statements of [the parties'] positions as to the action which ought to be taken by [the] court on remand." Petitioners asked that the injunction be vacated and the case remanded to the trial court with instructions to enter judgment in their favor. App., *infra*, 5a, 10a. Respondents, however, noted that *Scheidler II*

had "disposed of only the 117 extortion-based predicate acts," and that Petitioners had failed to "seek a *writ of certiorari* on the non-extortion-based predicate acts found by the jury," namely the 4 acts or threats of physical violence. App., *infra*, 13a. Because that issue had been neither presented to nor decided by this Court, Respondents suggested that a remand to the trial court to address the issue was appropriate. App., *infra*, 14a-15a. OR filed a response, App., *infra*, 17a-22a, and Respondents a short reply. App., *infra*, 23a-27a.

After considering the parties' various Rule 54 submissions, the Seventh Circuit concluded:

> Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of *certiorari*, we will not presume that in this case it went beyond the scope of its grant of *certiorari*, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

Sch. App. 28a. Therefore, the Seventh Circuit remanded the case to the district court to determine whether the physical violence predicates were alone sufficient to support an injunction. *Id. at* 28a-29a. The court stressed that as part of that inquiry – *if but only if* the trial court found injunctive relief were warranted – the trial court might need to address the statutory interpretation question Petitioners now urge on

this Court – whether physical violence is an independent violation of the Hobbs Act, or whether it must relate to robbery or extortion. *Id.*

Petitioners responded by filing petitions for rehearing and rehearing *en banc* in the Seventh Circuit, urging: (1) that this Court had resolved the physical violence issue in their favor by eliminating 117 of the 121 predicate acts found by the jury, and (2) that § 1951(a) could not be interpreted to prohibit physical violence unrelated to robbery or extortion. The Seventh Circuit denied rehearing *en banc*, and with only two dissents issued a new opinion further explaining its ruling.[4] Sch. App. 1a-24a. That rehearing opinion again observed that *Scheidler II* had not addressed the 4 acts involving physical violence: "Indeed, any reader will see that the Court had nothing at all to say about them, for the understandable reason that they were not included in the petitions for *certiorari*." Sch. App. 7a. The court emphasized that the unaddressed Hobbs Act question was a difficult and important one, and "for reasons of judicial economy and restraint," ruled it should be decided by the district court in the first instance. The Seventh Circuit also directed the district court to address that issue only if it first determined that an injunction was otherwise supportable. *Id.*

> If and only if the district court concludes that some form of injunctive relief would be justified based on

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[4] Judge Flaum joined the two dissenters in supporting rehearing *en banc* but did not join the dissent from the opinion on rehearing. Sch. App. 1a n. *

> the four remaining predicate acts found by the jury, that court will have to confront the more complex legal issue, whether the acts or threats of violence language in the Hobbs Act may serve as an independent predicate under RICO.

Id. at 7a-8a. The court stressed: "[T]here is no need for this court to decide a question that may not even be pertinent to the case once the district court has looked at the points on remand." *Id.* at 7a.

Petitioners, dissatisfied with an interim remand to the district court, asked this Court to take up this case for a third time.

ARGUMENT

Petitioners now seek a writ of *certiorari* on three questions. First, they say the Seventh Circuit disobeyed this Court's holding in *Scheidler II* by remanding to the district court to consider the physical violence issue that was neither presented to nor considered by this Court in *Scheidler II*. But as this Court has often held, on remand courts are bound only by issues within the compass of this Court's decision; they are free to identify and decide any other issues that remain undecided. The Seventh Circuit's decision to remand the remaining issues faithfully follows a century of precedent. *Certiorari* is wholly inappropriate.

Petitioners also ask this Court to grant *certiorari* on two substantive issues: first, whether the two-way or three-way reading of the Hobbs Act is correct; and, second, whether an injunction is available, a question that this Court declined to

decide in *Scheidler II*. At its current stage, however, this case is not a proper vehicle for either question. The Seventh Circuit remanded the case to the district court, where several factual determinations must first be made. A decision in Petitioners' favor on any one of these fact questions could moot both questions that Petitioners now present. This Court should abide by its settled practice of denying *certiorari* over non-final rulings remanding matters to the district court.

A. The Seventh Circuit's Remand Order Is Entirely Consistent with *Scheidler II*.

1. This Court Did Not Rule on the Physical Violence Issue. This Court's Rule 14.1(a) provides that: "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a). Although the rule is not a jurisdictional bar, this Court routinely refuses to address issues not fairly included in the questions presented. *See, e.g., Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 202–03 (2002); *Lopez v. Davis*, 531 U.S. 230, 244 n.6 (2001); *West v. Gibson*, 527 U.S. 212, 223 (1999) ("These matters fall outside the scope of the questions presented in the [ ] petition for certiorari. We remand the case so that the Court of Appeals can determine whether these questions have been properly raised and, if so, decide them."). Instead, any issues outside the grant of *certiorari* are typically left to the lower courts on remand. *See Glover v. United States*, 531 U.S. 198, 205 (2001).

In *Glover*, the government raised "various arguments for alternative grounds to affirm the Court of Appeals." *Id.*

Even though the parties had "joined issue" on these additional questions in their merits briefs (something that the parties did not do on the physical violence issue in *Scheidler II*), the Court refused to consider them, explaining:

> As a general rule ... we do not decide issues outside the question presented by the petition for certiorari. This Court's Rule 14.1(a). Whether these issues remain open, and if so whether they have merit, are questions for the Court of Appeals or the District Court to consider and determine in the first instance.

Id. As in *Glover*, Petitioners chose not to ask this Court to consider every issue when they petitioned for *certiorari* in *Scheidler II*. Instead, the predicate-acts-related questions that they posed focused exclusively on the meaning of "extortion." If Petitioners had wanted this Court to address the physical violence issue, it was their obligation to raise it in their "questions presented." *See Yee v. City of Escondido*, 503 U.S. 519, 535 (1992), ("it is the petitioner himself who controls the scope of the questions presented.")

As the Seventh Circuit observed in *Scheidler II*, this Court itemized and overruled 117 of the 121 predicate acts found by the jury but said nothing about the 4 remaining physical violence predicates. Sch. App. 6a-7a. Because the physical violence issue was not included in the questions presented for *certiorari*, was not addressed in the merits briefs to the Court, was not raised at oral argument, and was not mentioned in the Court's decision, on remand, the

Seventh Circuit understandably concluded that the issue had not been decided by this Court: [5]

> Given the Court's general refusal to decide issues outside the questions presented by a petition for a writ of certiorari, we will not presume that in this case it went beyond the scope of its grant of certiorari, which it characterized as "whether petitioners committed extortion within the meaning of the Hobbs Act," to hold *sub silentio* that the four acts or threats of physical violence found by the jury cannot support the injunction.

Sch. App. 28a.

Petitioners make the curious argument that because this Court invalidated the extortion-based predicates under state law and the Travel Act, this illustrates the Court's disregard for Rule 14.1(a). From this dubious springboard, they then argue that the Court somehow implicitly adopted their two-way reading of the Hobbs Act. Such reasoning defies logic. Although the Court decided that the meaning of extortion under the Hobbs Act controlled the meaning of that same word under state law and the Travel Act – an issue that the parties briefed on the merits – the Court *did so expressly*, with a detailed explanation of its reasoning. OR App. 46a-47a. The Court's discussion showed why these issues were

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[5] The Seventh Circuit did not suggest that this Court "overlooked" or "failed" to address the physical violence issue, as OR says at 6. In the Seventh Circuit's view, it was inevitable that this Court would not address the issue given that Petitioners never raised it.

fairly included in the extortion question on which the Court had granted *certiorari*. The Court's explicit ruling on these additional extortion-based predicates does not suggest that the Court also made *implicit* rulings on the separate physical violence issue, which was not even mentioned in the Court's opinion.

As this Court has repeatedly declared, issues not raised in the petitions for *certiorari* and not addressed by the Court are left to the consideration of the lower courts on remand. *Glover*, 531 U.S. at 205. The Seventh Circuit's remand to the district court to consider the physical violence issue was entirely consistent with the *Scheidler II* holdings.

2. *Scheidler II* Did Not Preclude Further Proceedings on Undecided Issues. Petitioners' argument hinges exclusively on the final paragraph of *Scheidler II*. They say that because it says "all of the predicate acts ... must be reversed," the lower courts could not address the undecided physical violence issue on remand. Petitioners' approach would contradict over a century of precedent and result in a dramatic expansion of litigation before this Court.

Petitioners cite only one case for their argument that the final paragraph of *Scheidler II* foreclosed consideration of undecided issues on remand, *In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895). *Sanford Fork*, however, undermines Petitioners' position rather than supports it.

In *Sanford Fork*, the petitioners argued that the circuit court disobeyed this Court's mandate by allowing amendments to the pleadings after the Court had reversed a

judgment for plaintiff. *Id.* at 258–59. The Court disagreed, explaining that it had not issued a final judgment, and – in language like that used here – made clear that it had only "ordered the judgment for the plaintiff to be reversed and the cause remanded to the circuit court for further proceedings not inconsistent with the opinion of this court." *Id.* at 258; App., *infra*, 1a. Thus, the Court explained that the circuit court was free, in its discretion, to allow amendments of the pleadings on remand. *Sanford Fork*, 160 U.S. at 259. Although the Court reaffirmed that lower courts must obey its mandate, the Court emphasized that the circuit court was nonetheless free to determine and resolve any remaining issues: "the circuit court may consider and decide any matters left open by the mandate of this court; and its decision of such matters can be reviewed by a new appeal only." *Id.* at 255.

The key to the circuit court's proper role on remand lies in determining what this Court has actually decided. As the Court explained in *Sanford Fork*, "When a case has been once decided by this court on appeal, and remanded to the circuit court, *whatever was before this court, and disposed of by its decree, is considered as finally settled.*" *Id.* (emphasis added). On remand, therefore, the circuit courts must determine whether any issues remain and, if so, how to resolve them.

Other opinions of this Court emphasize this long-standing rule. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 168 (1939) (while a mandate is controlling as to matters within its compass, on remand, a lower court is free as to other issues);

Quern v. Jordan, 440 U.S. 332, 346 n.18 (1979) ("On remand, the Circuit Court may consider and decide any matters left open by the mandate of this court."). The circuit courts follow the same practice with remands to the district courts. *E.g., United States. v. Kellington*, 217 F.3d 1084, 1092–95 (9th Cir. 2000) ("on remand, courts are often confronted with issues that were never considered by the remanding court. In such cases, broadly speaking, mandates require respect for what the higher court decided, *not for what it did not decide*.") (emphasis added).

Petitioners cannot seriously suggest that *Scheidler II* addressed and decided whether the two-way or three-way interpretation of § 1951(a) is correct. They cite no passage in *Scheidler II* where the physical violence issue is even mentioned. *Sanford Fork*, *Sprague*, and *Quern* all demonstrate that the Seventh Circuit was not only free, but obligated, to address the physical violence issue on remand.

3. Petitioners' New Mandate Rule Would Create Needless Litigation in This Court. Not only does Petitioners' "violation-of-the-mandate" argument flout both the *Glover* and *Sanford Fork* lines of precedent, but it would also foster needless litigation in this Court and an extremely inefficient re-allocation of judicial resources. First, Petitioners' proposed rule would require every respondent to raise in this Court every conceivable alternative ground to support the lower court's judgment, whether or not those grounds were fairly included in petitioners' questions presented. If a respondent failed to do so, and if the Court's remand instructions did not explicitly direct the lower courts

to address such issues, under Petitioners' theory, all alternative grounds would be automatically extinguished, without any briefing or consideration of their merits.

This Court has never required prevailing parties to raise alternative grounds for affirmance; the rule in fact is the opposite. In *Yee*, the Court explained why this is so important: by limiting its consideration to the questions presented in the petition, the Court avoids forcing respondents to address other issues. 503 U.S. 519 at 535-36. Where, as here, "the decision below involves issues on which the petitioner does *not* seek certiorari, the respondent would face the formidable task of opposing certiorari on every issue the Court might conceivably find present in the case." *Id.* at 536. In fact, when respondents do raise alternative grounds, the Court generally refuses to consider them. *See, e.g., West*, 527 U.S. at 223; *Roberts v. Galen of Virginia, Inc.*, 525 U.S. 249, 253–54 (1999).

Second, Petitioners' rule would exponentially increase the need for motions for clarification to this Court. Concerned that the lower courts might be foreclosed from further action absent specific instructions from this Court, parties would continually return to this Court seeking clarification about which unaddressed issues remained open on remand. By arguing that Respondents should have raised the physical violence issue by a motion for clarification to this Court, Petitioners ask for precisely this result.

Petitioner's new mandate rule would lead to an extremely inefficient re-distribution of the judicial workload between

this Court and the lower courts. This Court's practice of limiting its review to specified questions grows out of its need to "husband its scarce adjudicatory resources for the most fundamental constitutional and statutory questions, along with an occasional question of federal common law, sparing such additional energy as it can muster to seek as much uniformity as possible on lesser questions." 16B Charles Alan Wright, *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4001, 4 (2d ed. 1996). Forcing this Court to foresee and enumerate – or address on "clarification" motions – every conceivable remaining issue involved in each case it reviews would upset this careful balance. As this Court emphasized in *Yee*, 503 U.S. at 536:

> To use our resources most efficiently, we must grant certiorari only in those cases that will enable us to resolve particularly important questions. Were we routinely to entertain questions not presented in the petition for certiorari, much of this efficiency would vanish, as parties who feared an inability to prevail on the question presented would be encouraged to fill their limited briefing space and argument time with discussion of issues other than the one on which certiorari was granted. Rule 14.1(a) forces the parties to focus on the questions the Court has viewed as particularly important, thus enabling us to make efficient use of our resources.

The lower courts, which consider the entire bundle of issues that each case entails, are particularly well suited to determine what, if anything, remains to be resolved on

remand. Petitioners' approach would waste this Court's scarce resources and impose the burden of making this broad-ranging analysis on this Court, which has historically chosen not to spend its valuable time doing so.

4. Petitioners' Waiver Argument is Baseless. Petitioners blame everyone but themselves for their failure to raise the physical violence issue in *Scheidler II*. They argue that even though they made no mention of the question in their merits briefs in *Scheidler II*, Respondents somehow "waived" the physical violence issue by not raising it affirmatively in *their* merits brief. This argument distorts the law of waiver beyond recognition and ignores this Court's practice of declining to decide issues outside the questions presented.

Respondents' Brief in Opposition to the *Scheidler II* petitions for *certiorari* noted that the 4 acts involving physical violence were unchallenged by Petitioners. 01-0118, 01-0119 Br. In Opp'n. 4, 7. When the Court granted *certiorari* on two limited questions that did not include the physical violence issue – and after Petitioners' opening merits briefs said not a word about it – Respondents had no reason to address the issue.

Although a respondent is *permitted* to raise any alternative grounds for affirmance, there is no requirement that a party who prevailed below raise arguments outside the scope of the questions presented. In fact, as noted above at 21, one of the chief purposes of Rule 14.1(a) is to make efficient use of this Court's scarce resources and relieve the

respondent of "the expense of unnecessary litigation on the merits." *Yee*, 503 U.S. at 536.

Even when respondents do raise alternative arguments for affirmance, the Court typically refuses to consider them, deferring to the lower courts in the first instance. *See e.g.*, *West*, 527 U.S. at 223 (refusing to consider alternative bases outside the question presented in the petition for certiorari); *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (same).

The Scheidler Petitioners imply that the physical violence question was somehow "fairly included" in the questions they chose to present for review in *Scheidler II* and on which this Court granted *certiorari*. But their failure even to address the physical violence issue in their merits brief in *Scheidler II* undermines their argument and reveals that it is only a post-hoc rationalization for their omission. Furthermore, any such conclusion would violate settled principles regarding this Court's practice. Determining whether acts or threats of physical violence must involve robbery or extortion to violate the § 1951(a) would not assist in resolving the questions on which the Court granted *certiorari* in *Scheidler II*, [6] nor was it, like the state law and Travel Act extortion issues, inevitably controlled by those issues. *See Yee*, 503 U.S. at 537 (issue that would not assist in resolution of questions

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[6] "We granted *certiorari* in these cases to answer two questions. First, whether petitioners committed extortion within the meaning of the Hobbs Act, 18 U.S.C. § 1951. Second, whether respondents, as private litigants, may obtain injunctive relief in a civil action pursuant to 18 U.S.C. § 1964 of [RICO]." OR. App. 32a.

presented and that was not subsidiary to questions presented was not "fairly included therein"); *see also Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31-32 (1993) (question that is "merely complementary or related to the question presented in the petition for certiorari is not fairly included therein.") This Court made that point clear by resolving the extortion question in *Scheidler II* without so much as mentioning the 4 physical violence predicates or the statutory construction argument Petitioners now urge.

B. The Seventh Circuit Opinion is a Not a Final Judgment, and this Case is Not a Proper Vehicle for Deciding the Remaining Questions Presented

Petitioners also seek a writ of *certiorari* on the physical violence issue itself, and whether injunctive relief is available to private RICO litigants. In its current posture, however, this case is not a proper vehicle for addressing these questions. The Seventh Circuit decisions from which Petitioners seek a writ do not resolve these issues against them; the orders merely remand to the trial court to determine, in the first instance, whether the physical violence predicates could support an injunction. Contrary to Petitioners' contention, the Seventh Circuit expressly declined to decide whether the two-way or three-way interpretation of the Hobbs Act is correct. The court unequivocally left that question to be addressed first by the district court, and only if the district court were to find an injunction otherwise warranted.

In determining whether an injunction is warranted, the district court will need to resolve several factual issues, any one of which could end this case without any court deciding the questions presented. Therefore, *certiorari* should not be granted on the physical violence or injunction issue until – and unless – the lower courts resolve all the remaining issues in Respondents' favor.

1. This Court Disfavors Taking *Certiorari* Over Cases Remanded by the Court of Appeals Prior to Final Judgment. In *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), the Court explained that "[t]he decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application." *Id.*

Ever since *Hamilton-Brown*, this Court has followed this pragmatic practice of denying *certiorari* from circuit court decisions remanding cases to the district court. In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967), the Court denied a writ of *certiorari*, stressing that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993), the Court denied *certiorari* where the court of appeals had vacated the judgment and remanded to the district court "for determination of an appropriate remedy." (Scalia, J., concurring.) "We generally await final judgment in the lower

courts before exercising our certiorari jurisdiction. I think it prudent to take that course here." *Id.*

This case presents a non-final remand indistinguishable from *Virginia Military Institute* and *Brotherhood of Locomotive Firemen*. The Seventh Circuit's orders have remanded this case to the district court "to determine whether the four predicate acts involving 'acts or threats of physical violence to any person or property' are sufficient to support the nationwide injunction that it imposed." Sch. App. 28a. This Court should follow its long-standing practice of allowing the lower courts to make a final judgment before considering a writ of *certiorari*.[7]

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[7] Nor is mandamus appropriate. OR has not invoked this Court's jurisdiction under the All Writs Act, and it nowhere requests such a writ. Only the Scheidler Petitioners mention mandamus, and they do not explicitly seek it; they merely mention mandamus "[i]n an abundance of caution." Sch. Pet. 14 n. 6. The Scheidler Petitioners' passing references, Sch. Pet. at 1, 12, 14 n.6, do not begin to satisfy this Court's stringent requirements for mandamus. *Cheney v. United States District Court*, __ U.S. __, 124 S. Ct. 2576, 2586 (2004) (mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes").

Most importantly, the Scheidler Petitioners have failed to serve their petition on the parties against whom mandamus is sought. In a mandamus action, the judges of the lower court are parties to the litigation, and they are entitled to notice, representation by counsel, and an opportunity to respond. Sup. Ct. R. 20.3. The Scheidler petition was served only on counsel for Operation Rescue and Respondents; the Seventh Circuit has not been served nor given the requisite opportunity to respond. Sch. Pet. Cert. Serv. This is fatal to their request for mandamus. *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978). So, too, was their decision to caption their case as a request only for *certiorari*. Supreme Court Rule 20.2 requires mandamus petitions be styled "In re: petitioner."

2. No Court has Yet Addressed the Physical Violence Issue in this Case. Although Petitioners imply otherwise, the Seventh Circuit has not yet decided whether the physical violence prong of the Hobbs Act requires a connection to robbery or extortion. Instead, it remanded to the district court for consideration in the first instance. Sch. App. 6a-7a ("We take this opportunity to underscore the fact that we have not, at this point, ruled either implicitly or explicitly on the Hobbs Act issue, for reasons of judicial economy and restraint."). Nevertheless, Petitioners proceed as though the Seventh Circuit has decided this issue – and decided it against them. They argue, for example, that the Seventh Circuit's remand order creates a circuit split with the Ninth Circuit's *United States v. Yankowski*, 184 F.3d 1071 (1999). This argument is wholly disingenuous.[8]

The Scheidler Petitioners also fail the substantive requirements of Sup. Ct. R. 20.1, which provides that a petitioner must show that (1) the writ will be in aid of the Court's appellate jurisdiction; (2) exceptional circumstances warrant the exercise of the Court's discretionary powers; and (3) adequate relief cannot be obtained in any other form or from any other court. Sup. Ct. R. 20.1; Sup Ct. R. 20.3(a) ("A petition seeking ... a writ of mandamus ... shall set out with particularity why the relief sought is not available in any other court"). The Scheidler Petitioners fail on all three grounds. In particular, they have not made any showing – nor could they – that they are unable to obtain adequate relief from the district court in this case. The Scheidler Petitioners' have not sufficiently invoked the Court's mandamus jurisdiction under 28 U.S.C. § 1651.

[8] Petitioners also argue that the Seventh Circuit's decision is in conflict with an official interpretation of the United States, citing to a Department of Justice Criminal Resource Manual from 1997. They fail to note, however, that in 1999 the Government took the opposite position. *Yankowski*, 184 F.3d at 1072.

Nor has the Seventh Circuit prejudged the outcome on remand, as Scheidler implies. Sch. Pet. 18. The Seventh Circuit's discussion of this statutory construction issue merely illustrates that the question is far from easy or obvious, as Petitioners pretend. Sch. App. 8a. It shows that Petitioners' facially simple answers contain some apparent – although not necessarily fatal – flaws, and why certain passages of *Scheidler II* did not somehow subtly prove that this Court had adopted the two-way interpretation, as Petitioners urged. Sch. App. 9a. *See, e.g.*, Sch. App. 16a ("[T]he brief discussion we have included in this opinion demonstrates that the issue is a complex one that deserves not only full briefing and participation by all parties, but also input from the United States.") As a court of review itself, the Seventh Circuit concluded that principles of judicial economy required that the district court examine the issue first, focusing on the facts that the jury and trial court found – a function that the trial court is uniquely able to handle. If this Court granted *certiorari* on the physical violence issue, it would be the first court in this case to decide that question, something this Court generally takes care to avoid. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) ("we ordinarily do not decide in the first instance issues not decided below"). *See also Austin v. United States*, 509 U.S. 602, 622 (1993) ("prudence dictates letting the lower courts decide an issue first").

3. This Case Might Be Resolved in Petitioners' Favor on Other Grounds Below. This Court's practice of not granting writs of *certiorari* over non-final orders is especially

appropriate here. On remand, the district court might well resolve the case in Petitioners' favor on any number of grounds without ever reaching either of the questions Petitioners urge this Court to decide. For example, the Seventh Circuit instructed the district court to consider whether the 4 physical violence predicates found by the jury would be sufficient to support a modified injunction and expressed some skepticism on the subject: "it seems possible (perhaps even likely) that the district court might come to the conclusion that the 4 acts of physical violence are not sufficient standing alone to justify any injunction at all." Sch. App. 7a. If the district court decides that the physical violence predicates are *not* sufficient to support an injunction, there will be no need to resolve the statutory interpretation issues.

Petitioners could also prevail below on other grounds. For example, the district court might find that the physical violence do not constitute a "pattern" under 18 U.S.C. § 1962(c); or that no two of the acts were committed within a ten-year period, 18 U.S.C. § 1961(5); or that the physical violence predicates alone did not affect interstate commerce as required. All of these factual issues remain open under the special interrogatories answered by the jury and will have to be addressed by the trial court on remand. Sch. App. 190a–195a.

A decision by the district court in Petitioners' favor on any one of these or other issues could moot not only the physical violence question, but also the RICO injunction question that Petitioners now urge this Court to take, and thus

effectively end this litigation without any court needing to decide either of these two issues. Given that these issues might prove irrelevant to the resolution of this case, it is a particularly inappropriate vehicle for resolving them. This Court, therefore, should adhere to its long-standing practice of denying *certiorari* where the writ is sought from a non-final remand order by the circuit court.

CONCLUSION

The petitions should be denied.

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May 11, 2005

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APPENDIX

SUPREME COURT OF THE UNITED STATES

No. 01-1118 & 01-1119

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, and THE PRO-LIFE ACTION LEAGUE, INC.,
Petitioners

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

and

OPERATION RESCUE,
Petitioner

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.

ON WRITS OF CERTIORARI to the United States Court of Appeals for the Seventh Circuit.

THESE CAUSES came on to be heard on the transcript of the record from the above court and were argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in these causes is reversed with costs, and the cases are remanded to the United States Court of Appeals for the Seventh Circuit for further proceedings in conformity with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and The Pro-Life Action League, Inc., and Operation Rescue recover from National Organization for Women, Inc., et al., One Thousand Nine Hundred Fifty Dollars and Fifty Cents ($1,950.50) for costs herein expended.

January 15, 2003

Printing of record:	$1,350.50	(to be paid to Operation Rescue)
Clerk's costs:	600.00	($300.00 to be paid to each set of petitioners)
Total:	**$1,950.50**	

Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., for its women members and the class of all other women who are not NOW members and whose right to the services of women's health centers in the United States at which abortions are performed have been or will be interfered with by defendants' unlawful activities,	)	**On Remand from the United States Supreme Court**
DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other women's health centers in the United States at which abortions are performed,	)	**On Appeal from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge Presiding.**
Plaintiffs-Appellees,	)	
vs.	)	
JOSEPH SCHEIDLER, PRO-LIFE ACTION LEAGUE, INC., ANDREW SCHOLBERG, TIMOTHY	)	

MURPHY, and OPERATION RESCUE,

Defendants-Appellants.

CIRCUIT RULE 54 STATEMENT OF DEFENDANT-APPELLANTS JOSEPH SCHEIDLER, PRO-LIFE ACTION LEAGUE, INC., ANDREW SCHOLBERG, AND TIMOTHY MURPHY

Defendants-appellants, Joseph Scheidler, Andrew Scholberg, Timothy Murphy, and the Pro-Life Action League, Inc. ("the League"), state their position as to the action which ought to be taken by this Court on remand from the United States Supreme Court as follows:

After suffering nearly 17 years of arduous litigation under the federal antitrust and racketeering (RICO) laws, these defendants-appellants respectfully submit that on February 26, 2003, the Supreme Court sounded what ought to prove the death knell of this case, as follows:

> "Because of all of the predicate acts, supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated" (*Scheidler v. NOW*, 123 S.Ct. 1057, 1069).

These Defendants-appellants thus adopt the Circuit Rule 54 Statement of their co-defendant-appellant, Operation Rescue, and they join with Operation Rescue in urging that

the Court reverse the judgment below (in Nos. 99-3076, 99-3336, 99-3891, and 99-3892), vacate the permanent injunction, and remand with instructions that the district court enter judgment for defendants-appellants. They urge, too, that their appeal in No. 01-2050 from the district court's denial of their motion for post-judgment relief will become moot upon this Court's reversal of the August, 1999, judgment for plaintiffs-appellees.

Respectfully submitted this 18th day of April, 2003.

/s/ Thomas Brejcha

One of the attorneys for defendants-appellants

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Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.,	)	**Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge (on remand from U.S. Supreme Court)**
Plaintiffs-Appellees,	)	
	)	
v.	)	
	)	
JOSEPH SCHEIDLER, et al.,	)	
Defendants-Appellants.	)	

CIRCUIT RULE 54 STATEMENT OF DEFENDANT-APPELLANT OPERATION RESCUE

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CIRCUIT RULE 54 STATEMENT OF DEFENDANT-APPELLANT OPERATION RESCUE

This case is on remand from the U.S. Supreme Court. Pursuant to Seventh Circuit Rule 54, defendant-appellant Operation Rescue (OR) submits this statement regarding appropriate disposition of this case. As explained below, this Court should reverse and remand with directions to enter judgment for defendants-appellants.

Procedural recap

After this case went to trial on the RICO claims of plaintiffs-appellees (NOW et al.), the jury rendered a verdict finding that defendants-appellants were liable for damages under RICO, based upon predicate counts of state and federal extortion. Appendix of Defendant-Appellant Operation Rescue ("OR Appx.") at 138-42. The district court granted a permanent injunction (D1296-99)[1] and entered final judgment for NOW et al. (D1324-26). Defendants-appellants Scheidler et al. and defendant-appellant OR filed separate appeals,[2] which this Court consolidated, Orders of Sept. 28, 1999 and Nov. 18, 1999 (Nos. 99-3076, 99-3336, 99-3891, 99-3892). The district court subsequently denied post-judgment relief (D1444), and defendants-appellants filed another appeal (No. 01-2050), which this Court consolidated with the prior appeals, Order of May 18, 2001.

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[1] "D" refers to the district court docket number.

[2] The procedural history is set forth in greater detail in the Brief and Short Appendix for Defendant-Appellant Operation Rescue (pp. 1-4).

This Court affirmed the judgment of the district court, *NOW v. Scheidler*, 267 F.3d 687 (7th Cir. 2001), and denied rehearing and rehearing en banc, Order of Oct. 29, 2001.

The Supreme Court granted certiorari, *Scheidler v. NOW*, 535 U.S. 1016 (2002), and reversed, *Scheidler v. NOW*, 123 S. Ct. 1057 (2003).

Supreme Court disposition

The Supreme Court was explicit in its disposition of this case. The Court held that there was "no basis upon which to find that [defendants-appellants] committed extortion under the Hobbs Act," *Scheidler*, 123 S. Ct. at 1068, that the state extortion predicates were "fatally flawed," *id.* At 1069, and that the Travel Act counts "also fail," *id.* The Court then concluded:

> Because all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed. Without an underlying RICO violation, the injunction issued by the District Court must necessarily be vacated.

Id.

Appropriate disposition in Seventh Circuit

In light of the Supreme Court's express directions, this Court should now reverse the judgment below (in Nos. 99-3076, 99-3336, 99-3891, & 99-3892), vacate the permanent injunction, and remand with instructions to enter judgment for defendants-appellants. As to the appeal in No.

01-2050, which is an appeal from the denial of post-judgment relief, the overturning of the underlying judgment renders that appeal moot. Accordingly, the appeal in No. 01-2050 should be dismissed as moot.

Conclusion

WHEREFORE, in Nos. 99-3076, 99-3336, 99-3891, & 99-3892, this Court should REVERSE the judgment, VACATE the permanent injunction, and REMAND with instructions to enter judgment for defendants-appellants. In No. 01-2050, this Court should DISMISS the appeal as MOOT.

Respectfully submitted this 16th day of April, 2003.

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UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*, **Plaintiffs,**	)	**On Remand from the United States Supreme Court**
v.	)	**Nos. 01-1118 and 01-1119**
JOSEPH SCHEIDLER, et al., **Defendants.**	)	

PLAINTIFFS' CIRCUIT RULE 54
STATEMENT OF POSITION

Plaintiffs, the National Organization for Women, *et al.*, make this Statement of Position pursuant to Circuit Rule 54:

1. The Supreme Court's Opinion and Remand Order

On February 26, 2003, the Supreme Court issued an Opinion in these consolidated cases, reversing this Court's ruling with regard to the extortion-based predicate acts under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). On March 28, 2003, the Supreme Court issued an order remanding these consolidated cases to this Court for further proceedings, in conformity with that Opinion (Exhibit A hereto).

The Supreme Court's February 26 Opinion expressly left open the issue whether injunctions are available to private parties under RICO. Therefore, this Court's October 2, 2001, Opinion, holding that injunctions are available under RICO in private-party cases, such as this, remains undisturbed on this point.

Although the Supreme Court's February 26 Opinion disposed of the 117 extortion-based predicate acts, including both the Hobbs-Act-based extortion acts on which this Court's decision turned and state-law and Travel Act extortion, which this Court did not address, Defendants-Petitioners did not seek a *writ of certiorari* on the non-extortion-based predicate acts found by the jury. Accordingly, the Supreme Court made no ruling on the remaining category of predicate acts, namely, "acts or threats of physical violence, to any person or property." The jury found four (4) such acts, *see* Jury Verdict, ¶4(e), for a total of 121 predicate acts under RICO (Exhibit B hereto).[1]

As Plaintiff-Respondents noted in their Brief in Opposition to the petition for *certiorari* in the Supreme Court, at 5 n.4, 15, *see also* Respondents' Brief, at 3, 3 n.4, the predicate acts involving physical violence were an entirely separate category from the extortion-based crimes. The four physical-violence predicate acts do not rest on any

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[1] The Supreme Court's Opinion discussed 117 of the 121 predicate acts that the jury found. *See Scheidler v. National Organization for Women*, ___ S. Ct. ___, 2003 WL 467549, at 3 (2003) (listing the categories of extortion-based predicate acts, which comprise 21, 25, 25, 23 and 23 acts in each of five categories, these total 117 predicate acts). It did not address the remaining four acts of threats or physical violence found by the jury.

definition of extortion, and therefore they are unaffected by the Supreme Court's recent Opinion.

2. The Appeal to This Court from the Jury Verdict and Judgment

After the jury returned its verdict on April 20, 1998, and the district court entered judgment in Plaintiffs' favor, Defendants raised a number of issues on appeal to this Court. Among those issues was a challenge to the predicate acts that involved physical violence. The physical violence issue was briefed and argued by the parties before this Court, but this Court declined to reach the physical-violence issue because Seventh Circuit extortion law had been so clear that the Court found no need to reach this issue. *See, e.g., United States v. Stillo*, 57 F.3d 553, 559 (7th Cir. 1995); *United States v. Anderson*, 716 F.3d 446, 450 (7th Cir. 1983). *See NOW v. Scheidler*, 267 F.3d 687, 709 (7th Cir. 2001). This Court was not presented with the question whether the predicate acts that involved physical violence would alone support an injunction.

3. Issues Yet to Be Resolved

The question remains, therefore, whether the remaining four predicate acts of physical violence for which the Defendants were found responsible are sufficient to support the RICO injunction issued by the district court, now that the extortion-based predicate acts have been removed by the Supreme Court's recent ruling. (Defendants waived any arguments regarding the physical violence predicate acts by choosing not to seek *certiorari* on this issue in the Supreme Court.)

Plaintiffs respectfully suggest that because the district court had no reason to (and therefore did not) address the question whether the physical-violence predicate acts on their own are sufficient to support the RICO injunction, the district court should be given the opportunity to determine whether an injunction continues to be warranted. In addition, the district court should be given the opportunity to address the question of what portion of the damages are sustained by the predicate acts of physical violence.

WHEREFORE, Plaintiffs respectfully suggest that the injunction should remain in place until the district court has had the opportunity to review these open issues, and that the case should be remanded to the district court for further proceedings. In the alternative, Plaintiffs ask that the Court affirm the jury's verdict and the judgment of the trial court with regard to the physical-violence predicate acts, and remand the case to the district court for further proceedings.

Respectfully submitted,

NATIONAL ORGANIZATION FOR WOMEN, INC., et al.

Dated: April 17, 2003.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Nos. 99-2076, 99-3336, 99-2891, 99-3892, & 01-2050

NATIONAL ORGANIZATION FOR WOMEN, INC., et al., Plaintiffs-Appellees, v. JOSEPH SCHEIDLER, et al., Defendants-Appellants.	)	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division, No. 86 C. 7888, Hon. David H. Coar, Judge (on remand from U.S. Supreme Court)

RESPONSE OF DEFENDANT-APPELLANT OPERATION RESCUE TO PLAINTIFFS' CIRCUIT RULE 54 STATEMENT OF POSITION

ARGUMENT

Plaintiffs-appellees National Organization for Women et al. ("NOW") have asked this Court to defy the U.S. Supreme Court. *See* Plaintiffs' Circuit Rule 54 Statement of Position ("NOW's Rule 54 Statement"). This Court should decline that invitation.

The Supreme Court's judgment ordered that this Court's prior judgment be "reversed" and the case "remanded . . . for further proceedings *in conformity with the opinion of this [Supreme] Court.*" Judgment of Supreme Court (Ex. A to NOW's Rule 54 Statement) (emphasis added). Yet NOW urges this Court to reject the express directions set forth in the Supreme Court's opinion.

The Supreme Court held that "the injunction issued by the district court must necessarily be vacated." *Scheidler v. NOW*, 123 S. Ct. 1057, 1069 (2003). In flat contradiction of this, NOW says that the injunction "should remain in place." NOW's Rule 54 Statement at 4. The Supreme Court held that "*all* of the predicate acts supporting the jury's finding of a RICO violation *must be reversed*," and that "the *judgment that petitioners violated RICO must also be reversed*," 123 S. Ct. at 1069 (emphasis added). In flat contradiction of this, NOW argues that four of the predicate acts "are unaffected by the Supreme Court's recent Opinion," NOW's Rule 54 Statement at 2, that the Supreme Court "did not address" these four predicates, *id.* at 2 n.1, and that these predicates are "remaining" and may "sustain[]" damages or injunctive relief, *id.* at 3. Amazingly, NOW asks this Court to "affirm the jury's verdict and the judgment of the trial court with regard to [these] predicate acts," *id.* at 4.

NOW's remarkable request meets with several fatal obstacles.

First, the Supreme Court's judgment and opinion clearly preclude the disposition NOW seeks, as set forth above.

Second, NOW did not seek rehearing in the Supreme Court. NOW's position essentially is that the Supreme Court goofed when it ruled that "*all* of the predicate acts" must be reversed, because - - according to NOW - - that Supreme Court supposedly overlooked the four predicate acts that NOW claims survived the Supreme Court's reversal. NOW thus asks *this Court* to correct the *Supreme Court's* supposed oversight. The Supreme Court did not err, however: there is

no predicate act of "violence" as such. *See infra* pp. 3-4. Moreover, the correction NOW seeks, even if it were warranted, would be the exclusive prerogative of the Supreme Court, not this Court. NOW, however, did not even bother to ask the Supreme Court, via a petition for rehearing, to correct the supposed oversight NOW identifies.

Third, the Supreme Court, as NOW points out, NOW's Rule 54 Statement at 1-2, did not reach the question whether private parties can obtain injunctive relief under RICO. But the sole reason the Supreme Court did not reach the issue was that there was *no underlying RICO violation*, 123 S. Ct. at 1069 ("Without an underlying RICO violation, the injunction . . . must necessarily be vacated. We therefore need not address the second question presented - - whether a private plaintiff in a civil RICO action is entitled to injunctive relief under 18 U.S.C. §1964"). NOW claims the Supreme Court goofed here as well, because the Court's premise - - that there were no predicate acts remaining - - was supposedly erroneous. Again, NOW is mistaken in charging the Supreme Court with error. Moreover, NOW failed to take this issue up with the Supreme Court in a petition for rehearing, and NOW has no business asking this Court to "fix" the Supreme Court's opinion.

Fourth, even if it were proper for this Court to disregard the judgment and opinion of the Supreme Court, NOW's theory would provide no warrant for doing so. NOW claims that the Hobbs Act outlaws "physical violence" wholly apart from extortion or robbery. NOW's Rule 54 Statement at 2 ("non-extortion-based predicate acts"). The text of the Hobbs Act supports no such claim. *See* 18 U.S.C.

§ 1951(a). Indeed, a court would have to ignore the rules of grammar to twist the Hobbs Act to fit NOW's construction.[1] NOW cites no case authority for its position, and the only case addressing the issue is to the contrary, *see United States v. Yankowski*, 184 F.3d 1071 (9th Cir. 1999). *See also* Corrected Reply Brief for Defendant-Appellant Operation Rescue (7th Cir. May 10, 2000) at 16-17 (demonstrating

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[1] The Hobbs Act, 18 U.S.C. § 1951(a), may properly be parsed as follows (bracketed material and indentations added):

> Whoever
>
> > [i] in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or
> >
> > [ii] attempt or conspires so to do [i.e., to violate part i], or
> >
> > [iii] commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section [i.e., parts i or ii]
>
> shall be fined under this title or imprisoned not more than twenty years, or both.

Plainly, each of the three prongs of the offense relates, either expressly or by cross-reference, to robbery or extortion. NOW's purported construction, by contrast, lacks grammatical parallelism, is awkward, and is incapable of coherent parsing.

meritlessness of NOW's argument).[2]

CONCLUSION

Hence, for the reasons set forth in the Circuit Rule 54 Statement of Defendant-Appellant Operation Rescue, this Court should, in Nos. 99-3076, 99-3336, 99-3891, & 99-3892, REVERSE the judgment, VACATE the permanent injunction, and REMAND with instructions to enter judgment for defendants. In No. 01-2050, this Court should DISMISS the appeal as MOOT.

Respectfully submitted this 23rd day of April, 2003.

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[2] NOW itself conceded the connection between all of the alleged Hobbs Act predicates and extortion when it contended in the Supreme Court that "*each of the Hobbs Act violations* was also the basis for a finding as to state *extortion* laws," Brief of Respondents at 3 n.4 (emphasis added). *See also id.* (describing the 121 predicates as "state and federal *extortion* acts") (emphasis added). Moreover, the jury was instructed on "Federal law extortion, Hobbs Act," Tr. 4944, not on "non-extortion-based Hobbs Act" predicates. "Physical violence" was relevant only as an *element of extortion*, not as an independent predicate.

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Nos. 99-3076, 99-3336, 99-3891, 99-3892, and 01-2050

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,	)	
	)	**On Remand from the United States Supreme Court**
Plaintiffs,	)	
	)	
	)	
v.	)	**Nos. 01-1118 and 01-1119**
	)	
JOSEPH SCHEIDLER, et al.,	)	
Defendants.	)	

PLAINTIFF-APPELLEES' REPLY IN SUPPORT OF RULE 54 STATEMENT

As a threshold matter, Operation Rescue ("OR") argues against the Rule 54 Statement of Position of the National Organization for Women, Inc., *et al.* ("NOW") because, OR says, the Supreme Court has the "exclusive prerogative" to address any issues relating to its opinion. OR cites no authority for the proposition that only the Supreme Court can address the scope of its opinion, and OR is wrong in this regard for several reasons.

First, Petitioners OR and Joseph Scheidler, *et al.* ("Scheidler") each filed petitions for writs of *certiorari* in which they chose *not* to seek the Supreme Court's review of the jury's finding that they were responsible for the four (4) acts or threats of physical violence in addition to the 117

predicate acts of extortion.[1] Second, the Supreme Court's grant of *certiorari* was limited to two questions: (a) the meaning of "extortion," and (b) whether private parties may obtain injunction relief under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Third, none of the Petitioners' briefs in the Supreme Court even addressed the four (4) acts involving physical violence. Fourth, the Supreme Court's opinion carefully toted up the extortion-based predicate acts at 117, omitting any reference whatsoever to the four additional non-extortion predicate acts, which made the total of predicate acts found by the jury equal 121.

The law is clear that when a judgment is reversed and remanded, as here, it is for the lower courts to determine which issues are left for further disposition. In response to other reversals of circuit rulings, the Courts of Appeal recognize that claims not expressly precluded by the Supreme Court remain for the lower courts to deal with on remand, *e.g., Illinois Council on Long Term Care v. Shalala,* No. 97-2317, 2000 WL 689693 at *1 (7th Cir. May 25, 2000), ruling that "the Medicaid-related claims, however, were not before the Supreme Court and our disposition of those claims, however, were not before the Supreme Court and our disposition of those claims, therefore, is unaffected." A prominent treatise succinctly summarizes the rule: "If the [Supreme] Court reverses a judgment, only those portions of the judgment that the Court addresses and decides are

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[1] As we noted in our Rule 54 Statement, the viability of these non-extortion predicate acts was briefed and argued in this Court, *see* NOW, *et al.*'s Appellee Brief at 27-29 (a copy is attached for the Court's convenience).

affected." *Moore's Federal Practice* § 408.100(4) (3d Ed. 2002).

Here, the Supreme Court ordered that this Court's prior judgment be "reversed and the case be remanded . . . . for further proceedings in conformity with the Opinion of this Court." Because Petitioners never sought the Supreme Court's review of the jury's finding of the predicate acts involving physical violence, and because the Supreme Court neither granted *certiorari* nor ruled on those four predicate acts, four of the 121 predicate acts remain unaffected.[2] This Court, therefore, has jurisdiction to address the significance of the four undisturbed predicate acts and determine whether they are an independent basis for the injunction and damages ordered by the district court and affirmed by this Court in its opinion of October 2, 2001.

While it concedes that the Supreme Court left open the question whether a private RICO plaintiff may seek injunctions, OR argues that the Supreme Court's judgment irrevocably bars injunctive relief here. OR is wrong again. Although the Court held that without an underlying RICO violation, "the injunction . . . must necessarily be vacated," that statement was made in the context of the reversal of 117 of the 121 predicate acts. The Court's statement that there

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[2] OR's argument that we should have sought "rehearing" misses the mark. The Supreme Court's opinions *did not reach* the predicate acts involving physical violence. It is neither appropriate nor necessary to ask for "rehearing" on an issue that was neither raised nor addressed in the first place.

was "no underlying RICO violation that could support an injunction" obviously refers to the 117 extortion-based predicate acts that the Court enumerated and which it held did not constitute extortion. The four acts or threats of physical violence were not raised in the Supreme Court by OR or Scheidler nor addressed by the Court; whether these unchallenged acts are sufficient to support the judgment should be addressed in the first instance by the district court, as we showed in our Rule 54 Statement.

The Supreme Court's opinion in this case was meticulous in addressing extortion-based predicate acts. In an odd locution, OR portrays NOW's argument as if we contend that the Supreme Court "goofed" by failing to address and dispose of the non-extortion predicate acts on which a writ of *certiorari* was neither sought or granted. However, the Supreme Court has repeatedly emphasized that it is not in the business of reaching out to decide issues not brought before it, let alone giving advisory opinions about them. "And it is quite clear that the oldest and most consistent thread in the federal law of judiciability is that the federal courts will not give adversary opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (internal quotations omitted). The Supreme Court does not "goof" by hewing to this long-standing practice.

Respectfully submitted,

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(15)

No. 04-1352

IN THE

Supreme Court of the United States

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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ABBREVIATIONS KEY

App.	Appendix to Petition
JVF	Jury Verdict Form
NOW	Respondent National Organization for Women, Inc.
Opp.	Brief in Opposition (Nos. 04-1244 & 04-1352)
OR	Petitioner Operation Rescue (No. 04-1352)
Pet.	Petition for Certiorari
Pet'r	Petitioner
Sch.	Petitioners Joseph Scheidler et al. (No. 04-1244)
Tr.	Transcript of Trial

ARGUMENT IN REPLY

In *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), this Court put a definitive end to a meritless, marathon civil RICO suit. This Court held:

> *all of the predicate acts* supporting the jury's finding of a RICO violation must be reversed, *the judgment* that petitioners violated RICO must also be reversed[, and w]ithout an underlying RICO violation, *the injunction* issued by the District Court must necessarily be vacated.

Id. at 411 (OR Pet. App. 48a) (emphasis added). Given the extinction of this case on the merits, injunctive relief could not be sustained. *Id.* ("Without an underlying RICO violation, the injunction . . . must be necessarily vacated"). "*Therefore*, we reverse without reaching the question of the availability of private injunctive relief under § 1964(c) of RICO." *Id.* at 397 (OR Pet. App. 33a) (emphasis added).

The Seventh Circuit, on remand, held that *not all* of the predicate acts were reversed. OR Pet. App. 17a ("the four [predicate] acts of physical violence that the jury had found . . . were not encompassed within the Supreme Court's ruling"),[1] and that an injunction *may still* be sustainable under the jury's verdict, *id.* ("The only remaining question is therefore whether

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[1]The "four acts of physical violence" the Seventh Circuit referred to were the four "[a]cts or threats of physical violence to any person or property" found by the jury. *See* OR Pet. App. 143a (JVF #4(e)). The jury did not specify which four acts or threats it found. NOW had argued for a finding of twelve acts or threats altogether. OR Pet. at 4 (citing Tr. 5013-16, 5022-23). Obviously, the jury rejected eight of NOW's alleged acts or threats of "violence." NOW's reference to five of the twelve allegations, Opp. at 5, is therefore not only rank speculation as to what the jury might have found, but by simple arithmetic necessarily includes *at least* one, and possibly five, allegations which the jury in fact *rejected*.

any injunction is appropriate to redress the four acts of physical violence").

This manifest defiance of the mandate of this Court merits summary reversal. OR Pet. at 2, 8-13.

Moreover, by resuscitating this litigation, the Seventh Circuit has both reopened a circuit split over the availability of private injunctive relief under RICO *and* created a new circuit split over whether the Hobbs Act may plausibly be read to prohibit acts or threats of violence that merely "affect commerce," without any connection to extortion or robbery. Both of these latter questions independently merit plenary review. OR Pet. at 3-5, 13-26.

I. DEFIANCE OF THE MANDATE

The Seventh Circuit on remand essentially held that this Court erred when this Court concluded that "all" of the predicate acts were reversed. Respondents NOW et al. (hereafter "NOW"), in defense of the Seventh Circuit's remarkable conclusion, propose that this Court reviewed only 117 of the 121 RICO predicates which the jury had found, and that the four "violence" predicates were not before this Court. NOW's assertion is profoundly mistaken, as the following recitation will demonstrate.

A. Recap of NOW's treatment of the four "violence predicates"

When previously seeking this Court's review (in No. 01-1119), OR had explained that in this litigation "[t]he *only* predicate offenses under RICO at issue were *extortion* under the federal Hobbs Act, . . . *extortion* under state law, and *extortion* under the federal Travel Act . . . ." OR 01-1119 Pet. at 4 n.6 (emphasis added). OR challenged *all* of these predicates. *See id.* at 19-23 (Hobbs Act), 23-26 (state extortion), 26 n.27 (Travel Act).

In opposing certiorari, NOW falsely asserted that OR was not

challenging either the Travel Act predicates or the four violations of the Hobbs Act through acts or threats of physical violence. NOW 01-1118 & 01-1119 Opp. at 5 & n.4; *id.* at 7; *id.* at 15. NOW claimed that these supposedly unchallenged predicates were "independently sufficient to sustain liability." *Id.* at 15.

In reply, OR reaffirmed that each and every alleged RICO predicate in this case was a species of extortion, and that OR challenged all of them. OR 01-1119 Reply to Br. in Opp. at 7 & n.13. OR specifically noted that for "physical violence" to violate the Hobbs Act, such violence had to be in furtherance of a plan or purpose to commit extortion or robbery. *Id.* at 7 n.13 (citing *United States v. Yankowski*, 184 F 3d 1071 (9th Cir. 1999)).

This Court granted review. OR Pet. App. 138a.

In its opening brief on the merits, OR reiterated that NOW's RICO predicates were *extortion* claims. 01-1118 & 01-1119 Br. for Pet'r OR at 4, 25-26. OR specifically argued that rejection of NOW's theory of extortion would doom *all* of NOW's RICO predicates, *id.* at 49-50, and that "[a]ccordingly" OR was entitled to judgment in its favor "on all counts" and "on all claims." *Id.* at 50.

In its answering brief, NOW expressly referred to "121" (not 117) RICO predicates, i.e., including the four "violence" predicates. *E.g.*, 01-1118 & 01-1119 Br. of Respondents at 1, 3 & n.4. NOW gave no indication that four of the predicates were somehow not before this Court. In fact, NOW highlighted the alleged violent conduct. *E.g.*, *id.* at 2 & n.3, 11-12, 29, 50. Nor did NOW dispute OR's assertion that all of the alleged predicates were species of extortion. To the contrary, NOW argued that "[b]ecause the Hobbs Act requires the obtaining of property," NOW had "relied *only* on wrongful acts designed to make Respondents [NOW et al.] cede control of their property to Petitioners, *not on crimes that entailed no demand to*

surrender property." *Id.* at 9 (emphasis added). Moreover, NOW argued that "*all* of the acts that supported the jury's findings as to *Hobbs Act* violations *also* supported its findings as to *state law* violations," *id.* at 35 (emphasis added). *See also id.* at 3 n.4 ("*each* of the Hobbs Act violations were also the basis for a finding as to state *extortion* laws") (emphasis added). The only *state* law predicates NOW claimed were alleged *extortion*, OR Pet. App. 34a, 46a, 106a, 143a (JVF #4(b)); hence, this was tantamount to a concession by NOW that the Hobbs Act predicates were all extortionate as well.

NOW devoted three full pages of argument in response to OR's contention that rejection of NOW's theory of extortion under the Hobbs Act would defeat NOW's entire case. *Id.* at 33-36. Tellingly, NOW did *not* claim that *any* of the RICO predicates could survive apart from a showing of extortion. *Id.* Instead, NOW relied exclusively upon the argument that its *state* law extortion predicates independently supported the judgment. *Id.* at 11, 33-36.

In short, NOW abandoned its argument that the four "violence" Hobbs Act violations were independent of extortion, and that such predicates could independently support the judgment. Only after a resounding defeat in this Court, and after remand to the Seventh Circuit, did NOW propose that four of the predicate acts had survived untouched.

B. Rebuttal of NOW's arguments

Given this litigation history, NOW's arguments that the four violence predicates remain as grounds for RICO liability in this case are transparently inadequate.

NOW claims that it was incumbent on OR expressly to address, in its petition and merits briefs, the "violence-without-extortion" theory. Opp. at 7-8, 15, 22. But, as demonstrated above, OR had met that theory both explicitly in its reply in

support of certiorari and implicitly in its opening merits brief. When NOW abandoned the argument in its own merits briefs, OR had no obligation to rebut an argument NOW was no longer making.

NOW protests that as the party that prevailed below, it should not have to raise every possible alternative grounds for affirmance. Opp. at 19-20, 22-23. That may be true in general. But here, NOW *had* raised the four "violence" predicates as an alternative grounds in its opposition to certiorari. When OR explicitly argued in its opening merits brief that rejecting NOW's *extortion* theory would entitle OR to final judgment in OR's favor on *all* claims, NOW omitted at its peril any counter-argument asserting supposedly nonextortionate predicates. NOW made a calculated decision to respond to OR's argument *only* by invoking NOW's state extortion claims, and not the four "violence" predicates.

Finally, NOW reads significance into this Court's failure to mention the four "violence" predicates by name or number. Opp. at 9.[2] But given OR's repeated and uncontested assertion that *all* of the predicates hinged upon extortion, and NOW's total failure to say anything to the contrary, this Court had no occasion to reach out for (and reject) arguments on NOW's behalf that NOW had itself abandoned.

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[2]NOW attempts to muster additional evidence by misquoting this Court's use of "*inter alia*" in its opinion. *See* Opp. at 9 n.2. This Court used the term "*inter alia*" when referring to the jury's findings, specifically to some of the number totals in the Jury Verdict Form boxes. *See* 537 U.S. at 399 (OR Pet. App. 34a). The phrase "*inter alia*" simply indicated -- correctly -- that the jury also made other findings. It did *not* connote the existence of other theories of liability, *pace* NOW.

II. CONFLICT OVER AVAILABILITY OF PRIVATE CIVIL RICO INJUNCTIONS.

NOW makes no attempt to defend the Seventh Circuit's holding that RICO authorizes private injunctive relief. Instead, NOW argues that OR might win on other grounds, obviating any need to decide whether private civil RICO injunctions are available in the first place.

NOW overlooks, however, an important detail: after nearly twenty years of litigation, the *only* grounds for subjecting OR and the other defendants to *still more* proceedings is the prospect of NOW obtaining injunctive relief. In other words, if RICO does not authorize private injunctions, this case is over; there is nothing left for NOW to seek.[3]

In its most recent decision in this case, this Court -- after granting review on the RICO injunction question -- declined to decide that question because it believed (correctly, in OR's view, but erroneously, according to NOW) that this case was already at an end, for want of any supporting predicates. The Seventh Circuit contradicted that premise by ruling that four predicates remain; that holding, unless reversed, restores the need to resolve the question whether NOW can obtain injunctive relief under RICO.

III. CONFLICT OVER CREATION OF "VIOLENCE ALONE" PRONG OF HOBBS ACT.

NOW makes no effort to defend the Seventh Circuit's bizarre and unprecedented ruling[4] that the Hobbs Act may plausibly be

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[3]The Seventh Circuit held that it is "too late" for NOW to seek any further damages. OR Pet. App. 7a-8a, 61a-17a. NOW has not filed a cross-petition challenging this holding.

[4]NOW correctly concedes, Opp. at 3, 24, 27, that neither the Seventh

(continued...)

read to make a federal felony out of any act or threat of violence that "affects commerce."[5]

The Hobbs Act forbids "affect[ing] commerce" by "robbery or extortion." 18 U.S.C. § 1951(a) (OR Pet. App. 139a). It also prohibits attempts and conspiracies "so to do." *Id.* Finally, it prohibits acts or threats of "violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section," *id.* OR -- in harmony with the plain text of the statute, the holdings of the only two circuits to address the issue, and the Department of Justice, *see* OR Pet. at 8, 23-26 -- reads the phrase "violation of this section" in the Hobbs Act to mean "affecting commerce by robbery or extortion." OR Pet. at 23-25.

NOW disagrees, but -- like the Seventh Circuit -- NOW steadfastly refuses to explain just what, under its view, "a violation of this section" means. To read a "violation" to mean merely "affecting commerce" would be perverse. The Hobbs

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[4](...continued)
Circuit nor the district court has definitively held that NOW's "violence alone" theory is a *correct* reading of the Hobbs Act. But this understates the significance of the Seventh Circuit's ruling. By holding that the Hobbs Act *may* plausibly be read that way, the Seventh Circuit parted company with the Sixth and Ninth Circuits, both of which definitively rejected such a construction. OR Pet. at 8, 25-26. Moreover, the Seventh Circuit's conclusion that these four predicates "were not encompassed within the Supreme Court's ruling," OR Pet. Opp. 17a, turns on the essential premise that these acts need not be extortionate. In other words, the plausibility of a "violence alone" theory is the *sole and necessary* rationale for the Seventh Circuit's decision *not* to follows this Court's mandate.

[5]NOW points out, Opp. at 4, that the Jury Verdict Form (JVF) did not explicitly link the violent acts or threats to extortion. But neither did the JVF link the "violence" predicates to the Hobbs Act (as opposed to state law). *See* OR Pet. App. 143a (JVF #4(e)) Yet NOW concedes the latter link. *E.g.*, Opp. at 4. Obviously, the JVF label was meant to be shorthand *See* OR Pet. at 5. No significance can be read into the JVF label's omission of the full text of the Hobbs Act.

Act does not proscribe merely "affecting commerce." (If it did, most business operations would violate the Hobbs Act.) To read a "violation" to mean "affecting commerce by acts or threats of violence," meanwhile, would be hopelessly circular. The Hobbs Act would, under this reading, forbid "affect[ing] commerce . . . by . . . physical violence . . . in furtherance of a plan or purpose to [affect commerce by physical violence in furtherance of a plan or purpose to affect commerce by physical violence in furtherance *etc. ad infinitum*]." That is not statutory interpretation; it is a skipping record.

As the amici States persuasively argue, *see* Brief of the States of Alabama et al. (States Br.) (Nos. 04-1244 & 04-1352), NOW's proposed reading of the Hobbs Act is not only grammatically implausible, *id.* at 6-8, and (as OR argued in its petition, OR Pet. at 25) irreconcilable with the statutory evolution of the Hobbs Act, States Br. at 8-10, it is also untenable for other reasons. For one thing, reading the Hobbs Act to criminalize all violence that "affects commerce" would render superfluous numerous other federal statutes that address violence to persons or property in a more tailored manner. *Id.* at 10-12 (listing examples). For another, reading the Hobbs Act as a broad anti-violence statute would dramatically expand the scope of RICO, *id.* at 12, in conflict with the deliberate efforts of Congress to limit RICO's scope by enumerating selected predicate offenses, *id.* at 12-13. And as if that were not enough, construing the Hobbs Act as a general anti-violence statute would dramatically alter the federal-state balance, without any clear statement from Congress of an intent to do so. *Id.* at 13-18. *See also* Brief Amicus Curiae of Consistent Life et al. (Nos. 04-1244 & 04-1352) (decision below poses threat to labor unions and all social activists).

To the thorough analyses of the amici, OR wishes only to add that, even if the question were close and debatable (which it is